

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

BERNATELLO'S PIZZA, INC.

200 Congress Street
Maple Lake, MN 55358
(a Minnesota Corporation),

Plaintiff,

v.

Case No: 16-cv-65

HANSEN FOODS, LLC

930 Goddard Way
Green Bay, WI 54311
(a Wisconsin LLC),

Defendant.

COMPLAINT

The Plaintiff, Bernatello's Pizza, Inc. ("Bernatello's") as and for its Complaint against the Defendant, Hansen Foods, LLC ("Hansen") alleges and states as follows:

1. This is a civil action for a trademark infringement and unfair competition under the Lanham Act, 15 U.S.C. § 1051, et seq. and federal common law, and for related state claims arising out of the same case or controversy.

PARTIES

2. The Plaintiff, Bernatello's, is a Minnesota corporation with a principal place of business located at 200 Congress Street, Maple Lake, Minnesota 55358 and an office at N1719 945th Street, Eau Claire, Wisconsin 54701.

3. The Defendant, Hansen, is a Wisconsin LLC with its principal place of business located at 930 Goddard Way, Green Bay, Wisconsin 54311.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) because Hansen conducts substantial and ongoing business activities within this district and because the injury to the Plaintiff was and is occurring within this district.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because Hansen conducts substantial business in this district and because the harm to the Plaintiff occurred in substantial part in this district.

FACTS APPLICABLE TO ALL CLAIMS

I. Bernatello's Business Activities and Federally Registered Marks.

6. Bernatello's is in the business of producing and selling frozen pizza products to grocery stores, convenience stores, taverns, schools, club stores, food service providers, fundraising organizations, and other locations/channels throughout Wisconsin, the Midwest and its other geographic markets.

7. Bernatello's produces pizza under various "BREW" trademark varieties, including under the BREW PUB brand.

8. Bernatello's owns federal trademark registrations/applications, including at least the following: BREW PUB PIZZA (U.S. Registration No. 4,373,576), BREW PUB PIZZA and Design (U.S. Registration No. 4,431,990), BREW PUB (Application Serial No. 86/978,114), IT'S BREW TIME (Application Serial No. 86/870,938), and BREW (Application Serial No.

86/838,514), all as applied to pizzas (collectively hereinafter referred to as the “BREW trademarks”). (Attached as Exhibits 1 – 5 are copies of Bernatello’s trademark registrations and USPTO records for applications.)

9. The BREW trademarks, or some of them, have been used exclusively and continuously throughout the Midwest region of the United States and Bernatello’s other geographic markets from at least as early as October 23, 2012.

10. Bernatello’s has expended substantial amounts of money to conduct extensive advertising related to the sale of frozen pizzas under the BREW trademarks.

11. Bernatello’s has built substantial goodwill in the BREW trademarks.

12. The BREW trademarks are well known and recognized throughout the Midwest and Bernatello’s other geographic markets and have become distinctive of quality pizza originating solely with Bernatello’s.

II. Hansen’s Business Activities.

13. Hansen is in the business of selling frozen pizza products to grocery stores, convenience stores, food service providers, taverns, and fundraising organizations in Wisconsin and Minnesota.

14. Hansen uses identical channels of trade for selling its frozen pizza products as are used by Bernatello’s.

15. Hansen attempts to reach the identical customers as those of Bernatello’s.

16. Recently, Hansen filed a U.S. Intent to Use Trademark Application for the mark BREWHAUS as applied to pizzas (Application Serial No. 86/844,156).

III. Hansen's Pattern of Infringing and Tortious Conduct.

17. Bernatello's saw, for the first time on January 13, 2016, that Hansen actually provided frozen pizzas to grocery stores identified as "BREWHAUS" pizzas. (Copies of photographs of the BREWHAUS pizzas are attached and marked Exhibits 6 and 7.)

18. Like Bernatello's BREW PUB frozen pizzas, Hansen's BREWHAUS frozen pizzas are sold in the super premium frozen pizza category.

19. Like Bernatello's BREW PUB pizzas, Hansen's BREWHAUS frozen pizzas are packaged in clear plastic wrap with a circular "bullseye" label appearing in the center of the pizza surrounded by clear plastic wrap.

20. Like Bernatello's BREW PUB pizzas, Hansen's BREWHAUS pizzas utilize wide-dimensioned shredded cheese visible through the clear plastic wrap.

21. Bernatello's also recently learned that Hansen has begun manufacturing frozen pizzas which it packages and intends to market through a third party using the tradename BREW TIME. (Copies of photographs of the BREW TIME pizzas are attached and marked Exhibits 8 and 9.)

22. Upon information and belief, like Bernatello's BREW PUB frozen pizzas, Hansen's BREW TIME frozen pizzas are to be sold in the super premium frozen pizza category.

23. Like Bernatello's BREW PUB pizzas, Hansen's BREW TIME frozen pizzas are packaged in clear plastic wrap with a circular "bullseye" label appearing in the center of the pizza surrounded by clear plastic wrap.

24. Like Bernatello's BREW PUB pizzas, Hansen's BREW TIME pizzas utilize wide-dimensioned shredded cheese visible through the clear plastic wrap.

COUNT I

(Federal Trademark Infringement Under § 32 of the Lanham Act, 15 U.S.C. § 1114)

25. Bernatello's incorporates the allegations set forth in paragraphs 1-24, above.

26. Bernatello's marks are valid, legally protectable and enforceable marks owned by Bernatello's.

27. Hansen has begun presenting and selling its frozen pizza products branded as "BREWHAUS" and "BREW TIME" pizzas in the same geographic market as Bernatello's BREW PUB pizzas.

28. Hansen's BREWHAUS and BREW TIME branded frozen pizza products are sold/marketed in the same grocery and convenience stores as Bernatello's BREW PUB pizzas.

29. The use by Hansen of the names BREWHAUS and BREW TIME in connection with the sale of its super premium pizzas creates and/or will create a likelihood of confusion as to the origin or affiliation of its products compared to Bernatello's BREW PUB pizzas.

30. Prior to Hansen's adoption of the BREWHAUS and BREW TIME brand pizzas, Bernatello's had enjoyed exclusive sales since at least October of 2012 in the upper Midwest of pizzas in the super premium category selling under any trademark beginning with BREW in its mark.

31. Frozen pizzas are relatively inexpensive products frequently purchased by consumers without detailed scrutiny of the goods and their brands.

32. A frozen pizza consumer, upon encountering Bernatello's BREW PUB frozen pizza in a store at one time, and then later encountering Hansen's BREWHAUS or BREW TIME frozen pizza at another time, is likely to confuse or mistake Hansen's frozen pizza for Bernatello's given the similarities in their marks, their goods and the packaging thereof, particularly given imperfect consumer recollection.

33. Bernatello's BREW PUB pizzas are widely accessible and relatively inexpensive for consumers to obtain in the upper Midwest and while Hansen's BREWHAUS and BREW TIME pizzas are not yet widely distributed, Bernatello's believes that Hansen intends to widely distribute their BREWHAUS and BREW TIME branded pizzas in the same geographic territory, and at similar prices.

34. Grocery store managers familiar with Bernatello's BREW PUB brand pizzas have already expressed concern that there will be confusion if Hansen's BREWHAUS and BREW TIME branded pizzas are offered for sale in their stores.

35. In the past, Hansen previously sold a super premium pizza branded as "BIG BEN'S" pizzas.

36. Upon information and belief, Hansen's BIG BEN'S branded pizzas were not successful and Hansen has recently decided to rebrand its super premium pizza as BREWHAUS and BREW TIME branded pizzas in order to trade on the marketing success Bernatello's has enjoyed with its BREW PUB branded super premium pizzas.

37. By utilizing BREWHAUS and BREW TIME as brand names for its super premium pizzas, Hansen is intentionally attempting to cause confusion, mistakes and/or to deceive consumers into believing that its products are Bernatello's BREW PUB pizzas.

38. Hansen's BREWHAUS and BREW TIME brand names will confuse consumers into believing they are purchasing Bernatello's BREW PUB products.

39. As a direct and proximate result of Hansen's acts as alleged above, Bernatello's has suffered and will continue to suffer irreparable injury for which there is no adequate remedy at law. Such irreparable injury will continue unless and until Hansen is enjoined by this Court from further violation of Bernatello's rights.

COUNT II

(Unfair Competition Under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a))

40. Bernatello's incorporates the allegations set forth in paragraphs 1-39, above.

41. Hansen's improper use of the tradenames BREWHAUS and BREW TIME is likely to cause confusion, mistakes, and deception as to Bernatello's affiliation, connection, and association with the BREWHAUS and BREW TIME branded pizzas by Hansen.

42. Hansen's use of similar marks will cause confusion in the marketplace.

43. Upon information and belief, Bernatello's believes Hansen intends to use its BREWHAUS and BREW TIME marks in interstate commerce.

44. Hansen's BREWHAUS and BREW TIME marks will confuse consumers into believing they are purchasing Bernatello's BREW PUB products.

45. Bernatello's has suffered and continues to suffer damage as a result of Hansen's intent to trade upon its goodwill in an amount to be determined at trial.

46. Hansen's wrongful acts as alleged above will also irreparably injure Bernatello's for which there is no adequate remedy at law. Such irreparable injury will continue unless and until Hansen is enjoined by this Court from further violation of Bernatello's rights.

PRAYER FOR RELIEF

WHEREFORE, Bernatello's seeks the following relief:

- A. That Hansen be temporarily and permanently enjoined from using the marks "BREWHAUS" and "BREW TIME" and any other marks beginning with and/or including "BREW" in the sale of frozen pizzas;
- B. That judgment be entered in favor of Bernatello's and against Hansen for damages in an amount to be determined at trial;
- C. That Bernatello's be awarded its reasonable attorney's fees pursuant to the Lanham Act;
- D. That Bernatello's be awarded its costs and disbursements;
- E. That Bernatello's be awarded such other relief as deemed by the court to be just and proper.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Bernatello's demands a trial by jury on all issues triable to a jury in this action.

Dated this 27th day of January, 2016.

DEWITT ROSS & STEVENS s.c.

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